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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LARRY HERNANDEZ,
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15 JAIME CLAYTON, Chief,
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Petitioner,
v.
Respondent.

Case No.: 16cv2460 AJB (JMA)

ORDER:

**(1) DENYING REQUEST TO
PROCEED IN FORMA PAUPERIS
and**

**(2) DISMISSING CASE WITHOUT
PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 along with a request to proceed in forma pauperis.

REQUEST TO PROCEED IN FORMA PAUPERIS

Petitioner's Prison Certificate reflects a \$26.90 balance in his prison trust account. The filing fee associated with this type of action is \$5.00. See 28 U.S.C. § 1914(a). It appears Petitioner can pay the requisite filing fee. Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice.

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FAILURE TO NAME A PROPER RESPONDENT

Furthermore, review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. See *id.*

The warden is the typical respondent. However, “the rules following section 2254 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

Here, Petitioner, who appears to be currently confined in the Imperial County Jail, has incorrectly named “Jaime Clayton, Chief,” as Respondent. Additionally, Kamala Harris, the Attorney General of the State of California, is not a proper respondent in this action. Rule 2 of the Rules following § 2254 provides that the state officer having custody of the petitioner shall be named as respondent. Rule 2(a), 28 U.S.C. foll. § 2254. However, “if the applicant is not presently in custody pursuant to a state judgment against which he seeks relief but may be subject to such custody in the future,” then “the officer having present custody of the applicant as well as the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.” Rule 2 (b), 28 U.S.C. foll. § 2254. Here, there is no basis for Petitioner to have named the Attorney General as a respondent in this action.

In order for this Court to entertain the Petition filed in this action, Petitioner must name the warden or County Sheriff in charge of the correctional facility in which Petitioner is presently confined or the Secretary of the California Department of


1 Corrections and Rehabilitation. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
2 1992) (per curiam).

3 **CONCLUSION**

4 Based on the foregoing, the Court DENIES Petitioner's request to proceed in
5 forma pauperis and DISMISSES this action without prejudice. To have this case
6 reopened, Petitioner must, no later **December 9, 2016**, (1) pay the filing fee or provide
7 adequate proof of his inability to pay **and** (2) file a First Amended Petition that cures the
8 pleading deficiency set forth above. *A blank First Amended Petition is included with this*
9 *Order for Petitioner's convenience.*

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11 **IT IS SO ORDERED.**

12 Dated: October 7, 2016

13 
14 Hon. Anthony J. Battaglia
United States District Judge